code which permits the assignment of choses in action (Voorhies' N. Y. Code p. 76), appears to recognise fully the capacity of all the covenants, indiscriminately, to run with the land.

Most of the courts which have felt restrained from adopting the English rule would perhaps be prepared to entertain a suit in the name of the original covenantor, for the benefit of the injured party. 8 Humphreys 654; 10 Mo. 467; 19 Id. 71; 3 Met. 467; 8 Grattan 407. This method, though circuitous and often inadequate, may undoubtedly prevent many instances of hardship. In actions of this kind on the covenant against incumbrances, some difficulty may arise as to the proper form of the pleadings. Rawle on Covs. 378.

But the only natural and satisfactory view seems to be to regard the covenants for title as a single system for the protection of the title to land, so long as their protection can legitimately be required; and each individual covenant as a special safeguard against certain particular ways in which the integrity of the title may be attacked. Upon this view, all of the covenants for title *ought* manifestly to run with the land. T. A. H.

RECENT AMERICAN DECISIONS.

Supreme Court of Illinois.—November Term, 1862.

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* MELVILLE W. FULLER *vs.* L. P. HILLIARD *et al.*

In proceedings by *mandamus*, it is not indispensable that the petition should state that the relator is without any other adequate and sufficient remedy. If that appear to the Court to be the fact, the alternative writ will not be quashed.

The House of Representatives, in a State Legislature, have no such jurisdiction over the counting of the votes for members as will oust the jurisdiction of the common law Courts in proceedings by *mandamus* against the canvassers. The member elected has a right to receive the certificate of election, and if it is refused him, and given to another, he may call upon the Courts for redress, by *mandamus*.

Its sole purpose is to procure the requisite evidence to present to the House of a *primâ facie* right to a seat in it, independent wholly of the question of qualifica-

tion. And the only means by which this can be obtained is by the compulsory writ of *mandamus*.

This is not the case where one person desires to be placed in an office now filled by another, for in such cases *mandamus* will not lie. It is more analogous to a demand for the books and papers belonging to an office, or for the insignia of office, for which this is the proper remedy.

The office of canvassers is merely ministerial, and as such will be controlled by the Court under this process. They are required by statute to count all the votes formally certified to them. And the fact that some of the judges of elections do not appear to have been properly sworn, is no objection to the validity of their returns. The certificate of an officer *de facto* is all that is required.

And if any informality had really occurred, it might have been corrected before the canvassers, and should not have been allowed to operate to disfranchise the voters.

Petition for *mandamus*. The facts of the case are stated in the opinion of the Court.

W. C. Goudy and the relator in person, for the relator.

U. F. Linder, *J. L. King*, and *Davis*, for the defendants.

BREESE, J.—The petition in this case sets forth and shows that at an election held on the 4th day of November, 1862, for members of the General Assembly, and other officers, in the county of Cook, the relator, with others, was a candidate for representative in the sixtieth representative district, and was eligible to the office; that, at the election, thirty-four hundred and twenty-nine votes were cast for the relator, thirty-four hundred and twelve votes were cast for George H. Gage, thirty-three hundred and eighty-five votes were cast for Michael Brand, and thirty-three hundred and seventy-seven votes for John Lyle King, as shown by the poll-books, and by the certificates returned by the judges and inspectors of the election to the office of the clerk of the County Court of Cook county, provided all the votes shown by the poll-books and certificates to have been cast for these candidates should be counted. It further shows, after all the returns from the different towns, precincts, and wards in the county of Cook had been received by the clerk, on the 8th day of November, 1862, the clerk, L. P. Hilliard, called to his assistance J. B. Bradwell and L. H. Davis, two justices of the peace of the county, and proceeded to open the returns and make abstracts

of the votes cast for the different officers voted for at that election, and, in the performance of this duty, the clerk, with the assistance of these justices of the peace, opened the returns of the second precinct of the fourth ward in the city of Chicago, a legally established voting precinct in the sixtieth representative district, which was found in all respects to be in compliance with the statute of this State, except that the affidavits of two of the judges, and of the two clerks who acted in the precinct and made the returns, and which were prefixed to the poll-books, did not have the signature of the officers who administered the oaths attached to the several jurats; that one of the judges, John Leib, had been duly sworn before the clerk of the County Court, and his affidavit was in all respects regular; that Leib appeared before the board of canvassers, and offered to prove that the other judges and the clerks had been duly sworn by him after he had been sworn, and before they entered on the performance of their duties, and asked leave to put his name to the jurats, but the majority of the board refused to allow the proof to be made, or to permit Leib to sign his name to the several jurats, and refused to count the votes so shown by the poll-books and returns to have been cast in that precinct, for the only reason that the several jurats did not have the signature of the officer who administered the oath to the judges and clerks.

It shows that the returns from this precinct foot up one hundred and eighty-one votes for relator, and the same number for Brand, and fifty-nine votes each for Gage and King, for representatives, and that the rejection of these votes will deprive the relator of a certificate of election, and award it to King. The relator states he was present before the board when these returns were canvassed, and insisted that the votes appearing therein as having been cast should be counted and entered in the abstract, which was refused by the majority of the board. That if the votes of that precinct are received and counted, he will be entitled to a certificate of election, and he has demanded of the county clerk such certificate, which he refuses to grant, because of the rejection of these returns, and for no other reason, the effect of which will be to give to King a greater number of votes. The prayer of the petition is for an

alternative writ of *mandamus* against the clerk and the two justices of the peace, to show cause why a peremptory *mandamus* should not be awarded requiring them to count the votes cast in this precinct, and enter the votes so cast in the abstracts of votes, and against the clerk, requiring him to show cause why such writ should not issue to compel him to certify the election of the relator as a representative in the General Assembly for the sixtieth representative district.

To this alternative writ the clerk, Hilliard, returns on oath that he did, as clerk of the County Court of Cook county, on the day stated in the petition, call to his assistance Bradwell and Davis, justices of the peace of Cook county, and proceeded to canvass the votes as stated in the petition, and made abstracts of the votes, as shown by the relator, except that the affidavit of Leib was not offered to the board until a majority of the board had decided to throw out this poll-book, and, having canvassed all the returns presented to the board, thereupon the board dissolved; and he further states, that, on the 10th day of November, John Lyle King demanded a certificate of his election, which, as clerk, he made out and signed, and affixed the seal of his office thereto, and delivered it to said King, it bearing date November 10th, 1862, which is the true date.

Davis, on his oath, states in his return that he was called on to aid in canvassing the votes as alleged in the petition; that he met with the clerk and Bradwell, and proceeded to canvass the returns; that when the pretended poll-book of the second precinct of the fourth ward was presented, Bradwell looked at it, examined it, and pronounced it irregular and informal, and suggested to affiant that it must be thrown out, to which affiant agreed, and, the clerk concurring, the board decided to throw out that poll-book and returns, that subsequently the attention of the board was called to this poll-book, and arguments of counsel heard for and against throwing out these returns, and the affidavit of Leib was offered to complete the returns, and upon due consideration, and the exercise of sound discretion, the majority of the board decided to throw out this poll-book and return, and proceeded to canvass the remainder of the

returns and declare the result. That on Monday morning, the 10th, he called at the clerk's office, and, after examining the returns as made out by the board, he signed them, and thereupon the board was dissolved.

Bradwell, on oath, answers, admitting the statements in the petition to be true, and further says that at the time of counting the votes he considered the action of the majority of the board of canvassers wrong, and entered his protest against it; that he was always willing to have these votes counted. He further states that no certificate of election had issued to King until after the clerk was served with a notice by relator of this application for a writ of mandamus.

The exhibits attached to the petition show the oath taken by Leib, as one of the judges of the election, before the clerk of the County Court, which is in the form prescribed by the statute, and also the same form of oath alleged to have been taken by the other judges and clerks of the election, the jurats not being signed by the judge who administered the oath.

On the coming in of these returns the defendants, Hilliard and Davis, entered their motion to quash the alternative writ of *mandamus* for the reasons: First. Because the writ is returnable on the 14th of November, 1862, and the parties to be affected by it have not had ten days' notice previous thereto, and have not the opportunity on this writ of contesting the same for want of time. Second. Because the petition and writ do not show that the relator is entitled to the relief sought, and the matters contained in the writ are insufficient in law. Third. Because defendants are not required by law to reassemble and count the votes in question. Fourth. Because it does not appear that the relator has no other pecific legal remedy. Fifth. For want of jurisdiction in this Court, the House of Representatives alone having cognisance of the matter. Sixth. Because the return shows that the county clerk has, prior to the issuing of the writ, issued a certificate of election in conformity with the vote declared; and because the petition and writ are otherwise informal and defective.

Upon the first point the statute regulating this writ (Scute's

Comp. 223) does not require a notice of ten days, or any other specified number of days, but gives the Court power to allow such convenient time to make return, plead, reply, rejoin, or demur, as to the Court shall seem just and reasonable. By rule thirty-seven of this Court, ten days' previous notice of the application is requisite, unless the Court, for special reasons, shall otherwise direct. The longest time was allowed in this case which could be given within the term of this Court, though no special reasons were formally assigned for abridging the time. The fact that this Court sits but a few days in the first grand division, is a sufficient reason for dispensing with the notice of ten days. The term does not usually consume one-half that time. A formal and full return having been made to the alternative writ, affords conclusive evidence that the time allowed was ample.

The second ground is, in effect, a demurrer to the petition. No causes of demurrer are set forth, and we cannot discover any. The alternative writ stands as a declaration in an ordinary action, and is sufficient if it contains all the facts necessary to call into action the power of this Court. All material facts are fully set forth, so that they may be admitted or traversed. They are by the demurrer admitted to be true.

The only question is, what is the law on the admitted facts. The third ground may possibly be well taken, but constitutes no bar to the application. There is no necessity for reassembling the board of canvassers, for the return does not deny that the relator is entitled to the certificate if the votes of this precinct are counted. It is admitted they make up the majority of votes in favor of the relator, so that nothing remains but for the clerk to issue the certificate.

As to the fourth and fifth grounds of objection, the petition does not allege, in terms, that the relator has no other specific legal remedy, but, from the nature of the case, it is apparent he has none. He seeks to obtain the evidence of his election as a representative in the General Assembly—to obtain a specific thing which cannot be obtained through any other legal process. The House of Representatives cannot give it to him, though that body

may oust him, even when possessed of the certificate, for causes *dehors*. His remedy does not lie in the power of the House in this respect. It is preliminary to any action of that body, and over which it has no power, or control, or jurisdiction. It is a demand upon a ministerial officer to perform a duty, enjoined by law, for which all other legal process is wholly inadequate. The House of Representatives has no cognisance whatever of this matter. That body can only take cognisance of the case when the certificate is presented, and a seat claimed in virtue of it.

Upon the remaining ground of objection, that the county clerk had issued a certificate of election to another party, prior to the issuing out of this writ, it is only necessary to say that it is in proof the certificate was not issued until after notice of this application for this writ. When the fact was brought home to the clerk that this application was made, it would have been quite decorous and proper to pause in his action, and await the decision of the Court; the more especially as by issuing the certificate to a party not entitled, the right of the true claimant could not be weakened thereby. The power remains to the clerk to issue the certificate to the party this Court may deem entitled to it. *The People*, &c., vs. *Rives*, 27 Ill. 246. There are no other means known to the law by which this result can be obtained. Though the House of Representatives is the sole and exclusive judge of the qualifications of its members, this application has no reference whatever to the point of qualifications. Its sole purpose is to procure the requisite evidence, to present to that body, of a *primâ facie* right to a seat in it, independent wholly of the question of qualification. It is clear, then, the appropriate remedy is not with the House of Representatives. The only remedy the relator has—the only means by which he can obtain evidence of the right claimed, is by this compulsory writ of *mandamus*. This is very clear. No other process or proceeding can give the specific relief in the premises.

But it is urged that, as the certificate has already issued, the office is filled, and therefore the only remedy is by a contest before the House. Some cases are referred to in support of this position, but it will be seen most of them were applications for a *mandamus*

to admit to an office. This is not such a case. The relator asks not to be admitted to an office, but that evidence of his having been elected to an office shall be furnished him. It is not to turn one man out and put the relator in office that this proceeding is had. A *mandamus* will not lie for such purpose, and decision in this case cannot affect the right of another claiming the office. That is for the House of Representatives to determine. *The People, ex rel. Akin et. al.* vs. *Matteson & Stame*, 17 Ill. 169. In the case of *The People ex rel. Brewster & Jones* vs. *Kilduff*, 15 Id. 493, this Court said that *mandamus* was the proper remedy against an ex-mayor to obtain possession of the seal, books, &c., the property of the corporation, by his successor, and this without involving the inquiry into the right to the office. So in the case of *The People ex rel. Cummings* vs. *Head*, 25 Id. 325, it was held that a *mandamus* is an adequate remedy by which to compel an old clerk to deliver the insignia of office to the new, but not to try and determine the right of either party to a permanent enjoyment of the office.

In some of the States, this writ is not allowed for such purpose, but frequent resort has been had to it in this State, resulting in decisions quite uniform and harmonious, and which must be our guide in preference to the rulings of Courts of other States, cited by the defendants. We have noticed the fact, that the certificate of election, issued by the clerk to King, under which it is claimed the office is filled, was, in fact, issued after notice of this application, and that when notice was served, the canvass had not actually been completed.

But it is urged by the defendants, that the board of canvassers had and exercised a judicial discretion in ruling out these returns; and having acted in good faith, they cannot be compelled to act against their deliberate judgment.

We have recognised a board of canvassers as ministerial, and not judicial officers. In the case of *Head*, 25 Ill. 325, it was there said, The duty of a board of canvassers is a mere mechanical or mathematical duty. They may probably judge whether the returns are in due form, but, after that, they can only compute the votes cast

for the several candidates, and declare the result. This class of power is not generally understood to be judicial, but purely ministerial. In the case of *The People ex rel. Bristol* vs. *Pemson, Judge, &c.*, 2 Scam. 189, a *mandamus* was awarded to compel the judge to sign a bill of exceptions presented to him by the relator, though he had actually signed one bill, as appeared in the case. This Court said that the act of signing and approving the bills, is in its nature ministerial, though a legal discretion is in some measure to be used in determining whether or not the bill should be signed. In the case of *The People ex rel. Ch. Burl. and Quincy Railroad Co.* vs. *Wilson*, 17 Id. 123, which was an application to the defendant, as judge of the 13th judicial circuit, for the appointment of commissioners to appraise and condemn certain pieces of land for the use of a railway, and which he had refused to appoint, it was objected in this Court that the judge was acting in a judicial capacity, and that, having refused the application, a *mandamus* would not lie to compel him to reverse his decision.

This Court said: "We cannot, by *mandamus*, control the judicial action of any inferior tribunal. We can, in such a case, only set it in motion, and require it to act one way or the other, but without determining how it shall act. And so, too, when the inferior tribunal is vested with a discretion in the performance of a duty imposed by law. We can only compel the performance of the duty, without controlling that discretion, or saying how the duty shall be performed. Here the act to be performed by the circuit judge is strictly of a ministerial character."

In *Strong's Case*, 20 Pickering 484, it is said: "We are aware that this is not a writ of right, but grantable at the discretion of the Court, and will not be granted where there is any other adequate specific remedy. But we have no doubt that the present is a proper case for the exercise of our discretion, and that to refuse to grant the writ would be doing palpable injustice to the petitioner, and defeating the will of a majority of the voters of the county, clearly manifested by their votes, duly and legally evidenced before the proper tribunal. No other remedy can reach the evil."

These cases settle all the objections urged against the writ, and,

by necessary implication, seem to determine that, where a party is entitled to a specific thing, and there is no other specific remedy, by which the very right claimed can be secured, he is entitled, *ex debito justitiæ*, to demand it by *mandamus*. Bacon's Abridg. 418.

Now, as to the returns which were rejected by the board, were they in conformity to the statute? for on this hinges the whole controversy.

Section 23 of ch. 37, title "Elections," provides, "When the votes shall have been examined and counted, the clerks shall set down in their poll-book the name of every person voted for, written at full length, the office for which such person received such vote or votes, and the number he did receive, the number being expressed in words at full length; such entry to be made as nearly as circumstances will admit, in the following form." Scate's Comp. 468.

Section 25 of the same Act provides, that on the seventh day after the close of the election, or sooner, if all the returns be received, the clerk of the county court, taking to his assistance two justices of the peace of his county, shall proceed to open the said returns, and make abstracts of the votes, in the following manner, &c.; and it shall be the duty of the said clerk immediately to make out a certificate of election to each of the persons having the highest number of votes, for senator and representatives to the General Assembly, and to county officers respectively, and to deliver such certificate to the person entitled to it, on his making application for that purpose to the clerk at his office. Id. 468.

These officers are clothed with no discretionary power. They are to open "the said returns," and make abstracts of the votes as they appear in said returns, and the clerk is to deliver a certificate of election to each of the persons having the highest number of votes, as manifested by "the said returns." They are not allowed to reject any returns, or to decide upon their validity, if, on the face, they are made in compliance with the law, and in the form prescribed by the statute. If the returns show the whole number of votes given, the names of the persons voted for, and the number of votes given to each, they contain everything that is material, and, if duly authenticated, should be received as valid returns.

It is not denied these returns were duly authenticated, in the mode prescribed by section twenty-three, above quoted. No objection was made to the certificates of the judges and clerks. The board was bound to go by their certificates, and to declare the result, as shown by the certificates. *The People, &c.* vs. *Kilduff*, 15 Ill. 492.

The objection that the entry of the oaths of the judges and clerks of the election was not prefixed to the poll-books, as required by section 13 of Ch. 37, is of no force, for such entry forms no part of the certificate on which the board is to act. The certificate itself was formal and regular. But we think it was wholly immaterial, so far as the validity of the return was concerned, whether the officers of this election precinct, were sworn or not. They were acting *colore officii* in the performance of appropriate acts, and are presumed to have been well appointed and qualified. In the case of *The People* vs. *Cook*, 14 Barbour 259, it was said, if inspectors of elections come into office by color of title, that is sufficient to constitute them officers *de facto*; and if they are officers *de facto*, their omission to take the oath prescribed by the statute, will not invalidate an election held by them. This principle applies to all officers. This Court has said in the case of *The Town of Lewistown* vs. *Proctor*, 23 Ill. 533, if a person act as justice of the peace or police magistrate, whether he was irregularly elected or for a proper period, cannot be inquired into, collaterally—his decisions, under color of office, will be enforced. To the same purport is the case of *Greenleaf* vs. *Low*, 4 Denio 168.

It is sufficient then, for the purposes of this controversy, that the judges and clerks of this election precinct, were acting under color of office, having been duly appointed. It is not denied that they were officers *de facto*, and their certificate of the returns of the votes given in the precinct, being complete and full, and in strict compliance with the statute, the board of canvassers had no right to reject it. In rejecting it, they assumed a power dangerous to the citizen, and fatal to the elective franchise. Whence did the board of canvassers derive the power to entertain and act on this objection? It does not go to the character of the certificate, or to the

authentication of the returns—all these were formal and correct, and we have found no law, and recognise no principle, justifying their act.

But if it was an objection which the board could entertain, it was one which could be removed by a very simple act. The oaths of the judges and clerks were filled out as prescribed by the statute, and signed and sworn to by all of them, which is not denied. The only defect was, the officer who administered the oath to them, neglected to put his name to the several jurats, nor is this denied. And it further appears, that during the canvass by the board, and pending the consideration of this objection, the relator offered to remove the difficulty by an amendment in accordance with the fact, and for that purpose produced one of the judges of the election, Mr. Leib, who, the poll-book showed, had been duly sworn by the county clerk, and offered to prove by him, that he had administered the oath to the other judges and clerks, in the form required by the statute, and which it appeared by the poll-book they had severally signed. It was also proposed by the relator, that Leib should be permitted to perfect the entry of the oaths, by then signing the jurats, all of which was refused by the board.

We cannot but think this was a grievous error on the part of the board. It was at most but a formal defect, and such defects are always open to correction. In England, in the British House of Commons, it was decided that a mistake in the Christian name of a party returned as a member, and also a false return, might be amended even at the bar of the house (Hammond's Treatise on the Practice of Parliament 25); and there also, where the law requires the clerks of elections to be sworn, it was held, if they were not sworn, the election was not void. Peckwill's Cases of Contested Elections in Parliament 506. Here the poll-books contained true copies of the several affidavits or oaths taken by the officers of the election, and they were duly subscribed by them—the signature of the officer who administered the oath, was alone wanting to the jurats, and though he offered and desired to supply his own omission, it was refused, and two hundred and forty citizens thereby disfranchised.

We cannot reconcile it to our ideas of right and justice, that the voters of an entire precinct in an important and populous ward of the city of Chicago, shall be disfranchised by the neglect of the officer, who administered the oath of office to the judges and clerks of the election, to certify the fact, nor can we reconcile, on any principle, the refusal of the board to permit the jurats to be perfected. The amendment, if allowed, deprived no one of any right; it altered nothing, and was in furtherance of justice.

The certificate and returns were full and complete. The oath was no part of either. The plain duty of the board was to make the abstract from the returns, and give the certificate to the person who appeared by the returns to have received the highest vote. The question in all such cases should be, whom did a majority of the qualified voters elect? Forms should be made subservient to this inquiry, and should not rule in opposition to substance.

A literal compliance with prescribed forms is not required in any case, if the spirit of the law is not violated; and in all cases the intention of the voters clearly ascertained, should govern. Here has been a strict compliance with form, and the dearest right of freemen has, notwithstanding, been stricken down, and the plain and manifest intention of more than two hundred voters frustrated.

There being, then, no other specific remedy in the case, a peremptory writ of *mandamus* will be awarded to L. P. Hilliard, clerk of the Cook County Court, commanding him to issue a certificate of election to the relator, as a representative to the General Assembly, duly elected from the sixtieth Representative District in that county.

The foregoing opinion has been forwarded to us by the courtesy of Mr. Fuller, the relator. And we thank him most sincerely, on behalf of the profession and of all lovers of good order, not merely for making the decision public at an early day, which its importance would seem to justify, but more especially for bringing the question to judgment, and exposing the short-sighted and illiberal policy of narrow-minded and partisan public functionaries, in magnifying quibbles and refusing all remedy, by way of amendment, to the utter disfranchisement of the freemen and of their duly elected representative.

We know nothing of the facts in this particular case, even by report. For aught we know, the canvassers here may have acted in direct conflict with their political prepossessions, and given the certificate to one opposed to their own

political views, when one of their own party was elected; or both the competitors for the certificate may have been of the same political party. We are glad we do not know how these facts are. We hope they are such as not to implicate the canvassers in any suspicion of partiality growing out of political and partisan preferences.

But there has been so much of this duplicity and evasion in our country in high places, in giving certificates to candidates in the real minority of votes, in order to enable them thereby to defeat the will of the actual majority, by thrusting themselves into a place to which they were never elected, and thus virtually and practically defeating the rights both of the electors and the elected, that we deem it especially creditable, both to the candidate and to the Court, to bring the question thus speedily to a just determination. If Mr. Fuller does nothing more as the representative of the district, he will be gratefully remembered by all lovers of good order and decorum.

We are glad to believe that it was a mere error of judgment with the canvassers, and that they really gave the certificate to one opposed to their own political preferences because they sincerely believed the informality, in the jurats of the oath not having been signed by the officers swearing the judges of the election, rendered their return fatally defective. But the cases which we have before known have not always been of this character. Canvassers of elections are too apt to think that everything is fair in politics, and that the end justifies the means. We are therefore glad to furnish so healthy a precedent for the speedy correction of such errors.

There can be no doubt, we think, of the soundness of the decision. The opinion of MORTON, J., in Strong's Case, 20 Pick. R. 484, where the whole subject is examined in a most thorough and exhaustive manner, fully sustains the opinion of Judge BREESE in the principal case, and the authorities will be found there fully digested and collated. See also State *ex rel.* Danforth *vs.* Hunter, 28 Verm. R. 594. I. F. R.

District Court of the United States for the Northern District of New York. In Admiralty.

HEMAN NORTON STRONG *vs.* A certain quantity of Wheat, being the cargo of the schooner Convoy; FREDERICK T. CARRINGTON and WILLIAM J. PRESTON, Claimants.

A carrier, finding, on his arrival at the end of his portion of the route, that an unusual press of business there would prevent his delivery of his freight for several days, is not thereby justified in taking the goods to another place and forwarding them from there to the consignees.

A cargo was shipped to a certain port, to be there forwarded by railroad to the

consignees. The master of the vessel, after waiting two days and finding that his vessel could not be discharged for several days more, sailed to another port in the same State, and discharged his cargo there: *Held*, That his claim for demurrage at the first port could not be allowed.

The custom of the lake ports, that on the failure of the consignees to provide for the delivery of the property consigned to them for twenty-four hours after the report of its arrival, the master of the vessel was entitled to store the freight subject to charges at the nearest port, would not be a reasonable custom at Port Colborne, where there was no facility for the discharge of the cargo except at one place, and there was some proof of the custom of the port for vessels to wait their turn at that place.

Though the charter-party is ordinarily the controlling evidence of the contract as to everything clearly expressed therein, and bills of lading are often regarded as little more than evidence of the shipping and receipt of the cargo, yet, where the charter-party is not proved, or where it makes no provision in regard to the consignee or mode of delivery, the bills of lading become the proper and controlling evidence, in whole or in part, of the contract.

Freight is usually payable when it has been fully earned by the safe carriage and right delivery of the cargo.

HALL, J.—The libel in this case was filed to compel the payment of freight, on the cargo proceeded against, from Chicago to Port Colborne, and thence to Buffalo; demurrage for two days' detention at Port Colborne; and sundry expenses incurred by the unlading, storage, and insurance of the cargo at Buffalo.

The bills of lading for the cargo were in the following form:—

"Chicago, August 18, 1860.

"Shipped in good order and condition, by E. G. Wolcott, on board the schooner Convoy, of ———, whereof ——— is master, the following articles, marked and numbered as in the margin, to be delivered in like good order and condition (the dangers of navigation only excepted) unto consignees as per margin, or to his or their assigns. Freight and charges to be paid as noted below, upon the actual and complete delivery of the said goods and freight to said consignees or their assigns.

"In witness whereof the master of said vessel hath affirmed unto three bills of lading all of this tenor and date, one of which being accomplished the others to stand void.

ACC. J. H. Burch & Co. Care Carrington & Preston, Oswego, N. Y. *via* Welland Railway from Port Colborne to Port Dalhousie, thence by sail or steam vessel to Oswego."	16,014 35-60 Bushels No. 1 Spring Wheat (16,014 35). Freight to Port Colborne eight and one-half cents per bushel.

The bill of lading copied above was signed by E. G. Wolcott as agent of the shippers; and three other copies were signed by the master of the Convoy. The copy of the bill of lading annexed to the answer of the claimant is in substance the same, except that the name of "Alex. McKirdy," as master, is inserted in the body of the bill, that the name of "Alex. McKirdy" is signed at the bottom, and that under that signature is the following entry:

"Freight from Port Colborne to Oswego four and one-half (4½) cents per bushel—to be shipped from Dalhousie by steam or sail vessel classing not below standard. Dangers of navigation excepted, For Welland Railway,
WALKER & BROTHER, Agts."

There is no proof in regard to this entry, and it does not appear that at the time of the execution of the bills of lading, the agent or master of the Convoy knew that any special contract had been made for the transportation of the cargo of the Convoy over the Welland Railway. It must therefore be assumed that their knowledge of the final destination of the cargo, and of the mode of its transportation from Port Colborne, *via* the Welland Railway, to Oswego, was wholly derived from the entries in the bill of lading, so signed by the agent of the shipper, and similar bills of lading signed by the master of the Convoy.

The Convoy, with her cargo on board, reached the western terminus of the Welland Railway, at Port Colborne, on Lake Erie, on the 28th of August, 1860, between 9 and 10 o'clock in the evening. The next morning her arrival was reported to the agents of the Welland Railway Company, and, during that day and the next,

the master of the schooner and the agent of her owner several times desired the agents of the Company to discharge the vessel, or to fix some specific time for her discharge. The agents of the Railway Company declined to do either; stating that they could discharge vessels only in the order of their arrival, and that the Convoy should be discharged in her turn, as soon as the other vessels which had arrived before her and were then awaiting their turn could be discharged.

There was an unusual and extraordinary press of business at the Welland Railway Company's elevator at Port Colborne, and though vessels were discharged as rapidly as the capacity of the elevator and railway would permit, there was at that time an accumulation of vessels and consequent delay in their discharge. There was no other elevator or place of storage at Port Colborne, and if the Convoy was to be discharged there she would necessarily be discharged at the elevator of the Railway Company, or by hand labor. If discharged by hand labor, there was no means of storing the cargo there; and it would have been exposed to injury and loss.

When the Convoy arrived there were twelve or thirteen vessels waiting to be discharged, and as two vessels were usually discharged in each twenty-four hours, the Convoy, if she had been discharged in turn, would have been discharged on the sixth or seventh day after her arrival—or about the 4th day of September.

There was no agent of the consignees at Port Colborne, but there was telegraphic communication between Port Colborne and Oswego, where the consignees resided. No instructions were asked of the consignees and no information was sent them by the master of the Convoy, who, with his vessel, remained at Port Colborne until the afternoon of the 30th of August. He then sailed for Buffalo, which was the nearest port at which storage for the wheat could be obtained. The Convoy reached Buffalo the same evening, and the next day discharged her cargo at an elevator, her master taking a receipt for the wheat to be delivered to his order.

The day after the cargo was discharged the libellant, as owner of the Convoy, sent a telegram from Buffalo to the consignees at Oswego, in the following terms:

"Buffalo, Sept. 1, 1860.

"To Carrington & Preston:

"Obliged to store cargo Convoy in the Hatch Elevator in this city. Shall libel cargo for freight, demurrage at Port Colborne, and freight and charges here, unless settled immediately. Answer.

H. N. STRONG,
Owner Convoy."

On the receipt of this telegram the claimants despatched an agent to Buffalo, who offered to pay freight to Port Colborne and fifty or one hundred dollars in addition, but the libellant demanded $300 in addition to the freight provided for on the bill of lading. No settlement was made, and on the 5th of September, 1860, the libel in this case was filed.

On the hearing it was insisted, on behalf of the libellants, that the Convoy was chartered for the trip from Chicago to Port Colborne, to carry the wheat which constituted her cargo; that the bill of lading, subsequently executed, was therefore to be regarded only as a mere receipt for the wheat; that the charter-party, and not the bill of lading, was to be looked to as containing the contract of affreightment between the parties; and that if there was anything in the bill of lading to prevent the recovery of freight immediately on delivery of the cargo at Port Colborne, or relieve the owners of the cargo from the duty of receiving it there on the vessel's arrival, the bill of lading ought to be reformed so as to make it correspond with the alleged charter-party.

The libellants also offered and gave (subject to the claimants' objection) proof of the custom of the lake ports in respect to the disposition to be made of freight when the consignee does not provide for its reception within twenty-four hours after he is informed of its arrival. This evidence will be more particularly detailed hereafter, and its effect considered.

The allegations of the libel, so far as they relate to the alleged charter of the Convoy, are, in substance, that on the 18th day of August, 1860, E. G. Wolcott, the agent of the owners of this cargo, shipped, and the master and owner of the Convoy received on board that vessel, the wheat before mentioned, which the shipper agreed

should be carried, and which the said schooner, master and owner, agreed said schooner should carry from Chicago, aforesaid, to Port Colborne, in Canada, for the freight mentioned in a bill of lading, which was on the said last-mentioned day duly executed and delivered in triplicate; that it was agreed that said wheat should, pursuant to said bill of lading and contract, be carried to and delivered at Port Colborne, and that all the parties to such bill of lading and contract of affreightment (except said schooner, master and owner) agreed that they would receive the said cargo from the said schooner on her arrival at said Port Colborne, and would then and there relieve the said schooner therefrom, and pay the freight thereon from Chicago to Port Colborne aforesaid, and also, that the said schooner, master and owner did not, nor did any or either of them, ever, in fact, agree to carry said property from said Chicago to any other place than said Port Colborne, but did agree to carry said wheat from said Chicago to said Port Colborne, and there deliver the same—as the same as aforesaid was agreed to be received—to be carried from thence as in said bill of lading mentioned. The libel also further alleges that if the said bill of lading expressed any other or different agreement, the same was so expressed by mistake, and it prayed that the same—the said bill of lading—might be reformed and altered to conform to the contract of affreightment as aforesaid made.

The only evidence to sustain the allegation that there was a contract of charter prior to and independent of the contract evidenced by the bill of lading, is to be found in the deposition of Mr. Goodnow, the agent of the libellant, and the deposition of Mr. Wolcott, the agent of the claimants, by and between whom the arrangements for the carriage of the wheat were made.

The agent of the libellant says: "On or about the 18th day of August, A. D. 1860, I, as agent of H. N. Strong, chartered the schooner Convoy, which was then at the port of Chicago, to Mr. E. G. Wolcott, a commission merchant on South Water street, Chicago, Illinois, to carry a cargo of wheat from Chicago to Port Colborne, in Canada, at eight and one-half cents per bushel freight. This is the cargo now in controversy in this suit. At the time of

making said contract, or charter, no other destination or port was named but Port Colborne. Mr. Wolcott made out some bills of lading for me, leaving the number of bushels of wheat blank for the captain to sign, as she would not be loaded until after office hours. The captain signed the bills of lading and I took them to the office of Mr. Wolcott, the next morning. The bills of lading signed by the captain were three in number. The fourth bill of lading annexed to the deposition as exhibit A, is signed by the shipper, E. G. Wolcott, and is an exact copy of the three bills of lading signed by the captain, with the exception of the names of the signers. At the time the cargo was shipped and the bills of lading were signed, there was no contract or any other understanding of whatever kind for the transportation of the cargo to Oswego or any other port. It was only from Chicago to Port Colborne that said contract was made for."

The agent of the claimant says: "I contracted with Mr. Goodnow for the schooner Convoy, about the 18th of August, 1860, to take a cargo of wheat from Chicago to Port Colborne, and I think I made a contract with one of the Mr. Walkers to take it from there through to Oswego. Walker was agent of the Welland Railway Company." * * * * "My only conversation or understanding with Mr. Goodnow was in relation to Port Colborne only, and that was the contract made with Goodnow, from Chicago to Port Colborne."

There is nothing in this testimony or in the other testimony in the case to justify this court in disregarding or modifying the contract evidenced by the bill of lading. There was probably a simple agreement that the vessel should take a cargo of wheat to Port Colborne at 8½ cents per bushel. Leaving the details of the contract to be determined by the custom and usages of shippers, masters, and vessel-owners, at Chicago, and looking to the execution of a bill of lading as the final evidence of the terms of the contract; or it may be that the bills of lading which were prepared with a blank for inserting the quantity of wheat, after the cargo was put on board and the quantity ascertained, were prepared at the time of the first agreement as evidence of the contract agreed to by the

agents of the parties. This testimony of the agents of the parties should not therefore control or affect the bill of lading in this cause.

It is true that bills of lading, signed by the master of a vessel, under a charter-party for the voyage, are often regarded as little more than evidence of the shipping and receipt of the cargo, and that the charter-party is ordinarily the controlling contract as to all the terms or provisions clearly expressed therein. Parson's Maritime Law, 240, 241. But where a written charter-party makes no provision in regard to the consignee or mode of delivery, the bills of lading, which supply the omission, cannot be deemed inoperative and invalid, because of the pre-existing charter-party.

But in this case there is no evidence of a charter-party. If the cargo had been lost or damaged prior to its arrival at Port Colborne, the liability of the owners of the Convoy would not have been that of bailees to transport for hire, under a charter-party—who are only bound to the use of ordinary skill and care;—but the greater and more stringent liability of shipowners and carriers. The contract made by the agents of the parties was a contract for the carriage of the wheat, not the charter of the Convoy; and the bill of lading is, therefore, the proper and controlling evidence of the contract.

The bill of lading shows that the Convoy was to carry the wheat only to Port Colborne; at least this is apparent when the terms of the bill of lading are considered in connection with the proof that if the wheat was transported to Oswego, *via* the Welland Railway, it must necessarily leave the vessel at Port Colborne. The parties who made the contract knew this. They stipulated for the freight to Port Colborne only; they provided for a different mode of transportation beyond; and they knew that on the arrival of the vessel at Port Colborne, she would, in the ordinary course, and according to the custom of that port, be discharged at the elevator of the Welland Railway Company. The master who signed the bill of lading had been at that port frequently, and he knew that the wheat, if discharged there and sent forward by the Welland Railway, must necessarily be delivered at that elevator, unless the

tedious and expensive process of unloading by hand labor was adopted.

Doubtless both parties expected and intended the vessel should be discharged at the elevator. The shipper did not expect that the cargo would be delayed by the slow process of discharging the wheat by manual labor, and the shipowner did not expect to incur the expense of manual labor for that purpose.

The Welland Railway Company was one of the carriers on a portion of the line of transportation over which the wheat was intended to pass (as appeared upon the face of the bill of lading signed by the master under the inspection of the agent of the Convoy), and both parties expected that the Railway Company would receive and transport the cargo of the Convoy over their road. They equally relied on the ability of the Railway Company to receive and forward the cargo without delay; and they doubtless were equally disappointed when it was found that in consequence of an unusual and extraordinary press of business, at Port Colborne, several days must elapse after the arrival of the vessel before she could be discharged.

The testimony shows that the Railway Company discharged the vessels at Port Colborne in their turn, according to the order of their arrival, and as rapidly as their means would allow; that the Convoy would have been discharged in her turn, as soon as all other vessels waiting for their discharge at the time of her arrival, had been discharged; and that she would have been so discharged in from six to eight days after her arrival. She remained at Port Colborne two days and three nights, for which her owner now claims $150 demurrage, and then, there being no means of immediately storing her cargo at Port Colborne, she came to Buffalo and put it in store in this city.

In determining the rights of these parties in regard to the disposition of the cargo of the Convoy, under the contract evidenced by the bills of lading and the peculiar circumstances of this case, it is proper here to consider the proof of the custom of the lake ports, which it was insisted justified the course taken by the master of the Convoy. The libellant's witnesses stated in substance, that it was

the custom of many of the lake ports—and so far as they knew at all of them—for the master of a vessel to report her arrival with freight, and to allow the consignees twenty-four hours to provide for the delivery and receipt of the property consigned to them, and that if the consignees were not, at the end of that time, prepared to receive the freight, the master of the vessel was entitled to store it, subject to charges, at the nearest point. It was not, however, stated by these witnesses, that they could mention any case where a vessel had left the port of destination, under such a custom. The agent of the libellant admitted he could not do so, and that the information he had in regard to the custom at Port Colborne was, that it was there the custom for vessels to wait their turn to be discharged.

It is true that in the absence of express agreement, the duty of the master in the delivery of freight must necessarily be determined by the custom which regulates the mode of delivery at the port of discharge. In the absence of express contract, the parties are presumed to have contemplated a delivery according to the established custom. And proof of a custom prevailing at most of the ports on the Great Lakes, without any countervailing proof in respect to the other ports, might be sufficient proof of the custom, at other ports on the same lakes, under similar circumstances. If there was no reason for presuming the existence of a different custom, the general usages and customs of the lake ports might, in the absence of all proof in respect to the particular port, be presumed to prevail there also; but in this case there is some proof of a different custom at Port Colborne,—a custom to discharge vessels in the order of their arrival. Port Colborne, as a commercial port, is very different from the other lake ports, and the custom proved which is reasonable and proper at other ports, is not likely to be adopted at that port. Considering the peculiar character of the port and of its business, and especially the fact that it has no facilities for discharging vessels or storing their cargoes, except such as are furnished by the elevator of the Welland Railway Company, no custom except for vessels to wait their turn can be considered as just or reasonable;

and no other custon can, under the proofs in this case, be considered as having been within the contemplation of the parties by whom the contract of affreightment in this case was made. The master of the Convoy and the agent of her owner knew, as well as the shipper and owner of the cargo, what means of discharging the vessel were to be found at Port Colborne, and if, when the contract of affreightment was proposed, they were unwilling to take the danger of delay consequent upon this mode of discharging this vessel, they should have provided against it by stipulating for demurrage.

I am therefore of the opinion that the master of the Convoy was bound to deliver his cargo to the Welland Railway Company, and to wait his turn for the delivery of his vessel.

But if the master of the Convoy was not bound to remain at Port Colborne until his vessel could be discharged in its order, he did not do what he ought to have done, before taking the cargo to Buffalo and there storing it. There was telegraphic communication between Port Colborne and Oswego, where the consignees of the wheat resided, and during the time he remained at Port Colborne information of the delay and its cause could probably have been sent to the consignees, and their instructions received in return. The consignees might have offered a fair demurrage or have given special instructions for the disposition of the wheat; and it was the duty of the master to endeavor to communicate with the consignees, when it was probable that their instructions could be readily obtained.

If, when a cargo reaches the port of destination at the residence of the consignee (who is presumed to know that his interests will require attention on its arrival), the shipmaster, in the absence of any particular custom, is bound to use due diligence to find the consignee and obtain his instructions, before he assumes to put the cargo in store, on the ground that no other proper delivery can be made, it would seem to be more clearly his duty to use due diligence to obtain the consignee's instructions, in regard to the disposition of the cargo, where the difficulty in carrying out his contract of affreightment, as originally contemplated, arises at an

intermediate port, where the consignees were not expected to be present, either in person or by their agents.

The disposition of the cargo by the master requires, at all times, the utmost caution on his part. He should always bear in mind that it is his duty to do all in his power to carry out, to the extent of his engagement, the prime object of his employment—the forwarding of his freight, by the route and means agreed upon, to the place of its final destination. It is for this purpose that he has been intrusted with it, and this purpose he is bound to endeavor to accomplish, by every reasonable and practicable effort, until he has delivered his freight according to his contract, or such delivery has become entirely impracticable. Even at the port of final destination and the presumed residence of the consignee, he is bound to make every reasonable effort to deliver the cargo personally to the consignee, or in accordance with the known and established customs of the port; which customs are presumed, in the absence of express agreement, to be within the contemplation of the parties, and to be, by their tacit consent, silently introduced into the contract of affreightment. If he is required to do this at the port of final destination and the place of business of the consignee, he cannot be required to make less effort to perform his contract and protect the interests of the absent owner, in an unforeseen emergency, at an intermediate point, where the consignee was not expected to be present, but necessarily relied upon the acts of another carrier having exclusive control of the means of carriage over a portion of the line of transportation. Good faith, the interests of commerce, and a wise public policy equally require that the master should do all in his power to protect the interests of freighters in such unforeseen and extraordinary emergencies, and the master of the Convoy should not have diverted the wheat of the claimants from the line of transportation they had chosen, and have thereby subjected it to unusual and unexpected charges, and exposed its owners to a prosecution for a breach of their contract with the Welland Railway Company, until he had atempted by telegraph to communicate with the consignees.

It was contended on the argument that under the bill of lading

n this case no freight could be demanded until the delivery of the wheat to the consignees at Oswego, the port of final destination, but in the view I have taken of this case it does not become necessary to decide the question. It may possibly be doubtful what would be the true construction of the bill of lading independent of any custom;—and also whether the custom for the different carriers along the same line of transportation, to advance to each preceding carrier all accrued freight and charges and receive the goods and merchandise, subject to such charges, to be collected with their own charges, on delivery to the next carrier or the consignee, has been so long and so well established, and so often proved in Court, as to require this Court to take judicial notice of such custom without proof in the particular case. It is probable that this custom was understood by the parties in this case, and that they intended it should be acted upon; and it is most likely that it was not intended or expected that the freight earned by the Convoy should either remain unpaid, after the delivery of the wheat at Port Colborne, or be advanced by the consignees before the wheat reached Oswego. All parties doubtless supposed it would be advanced by the Welland Railway Company, according to the known and established custom.

Independent of the custom and looking to the bill of lading alone, I am not prepared to say that the consignees were bound to pay freight before the wheat arrived at Oswego. Freight is usually payable when it has been fully earned by the safe carriage and right delivery of the cargo, and if the bill of lading had simply provided for the payment of the Convoy's freight on delivery, the delivery referred to would have been the delivery by her at Port Colborne. But such is not the provision in the bill of lading. The freight is declared to be payable "upon the actual and complete delivery of said goods and freight to said consignees or their assigns"—and it is clear that the delivery to the consignees was to be at Oswego and not at Port Colborne.

What would have been the effect upon the rights of the parties of an absolute refusal on the part of the Welland Railway Company to receive the wheat or advance the freight of the Convoy,

and what would have been the duty of the master under such circumstances, it is not now necessary to decide, for the Railway Company did neither, and only asked that the Convoy should wait her turn, and be discharged in her order.

The libel is dismissed, with costs.

This case, for which we are indebted to the courtesy of Judge HALL, was decided by him in the early part of last year, and taken to the Circuit Court on appeal. At the October session, 1862, the opinion of that Court was delivered briefly by Mr. Justice NELSON, affirming the decree upon the opinion of Judge HALL in the Court below.

The case was of importance, not only as it affected the right of the shipmaster to change the port of delivery and forward his freight to the consignees by a route different from that laid down in his contract, but also as it involved, to some extent, the judicial recognition of customs claimed to be established at the lake ports.

The particular custom alleged was for the master of a vessel to report her arrival and allow the consignees twenty-four hours to provide for the delivery and receipt of the cargo, and in case they failed to do so in that time, the master to be entitled to store the freight, subject to charges, at the nearest point.

The reasonable character of such a custom is discussed, though not expressly decided upon, the proof having failed to come up to the point claimed by the libellant, and there being some evidence that the custom of the particular port named in the contract was different and was known to all the parties.

While the general principle is abundantly well settled, that the custom of the trade or the usage universally attached to the subject-matter in the place where the contract is made, may be used as evidence to explain the ambiguities or supply the omissions of defective contracts (Addison on Cont. 851; 1 Greenl. Evid. § 292), and though the decisions draw a clear line of distinction between a custom modifying general contracts, which must be long-continued, even from time immemorial, and a usage of trade which may be of recent origin (Barton *v.* McKelway, 2 Zabr. 165; Knowles *v.* Dow, 2 Foster 387; Townsend *v.* Whitby, 5 Harrington 55), yet it is important to bear in mind that even in the case of mercantile usage this rule was meant for a *general, uniform, notorious*, and *reasonable* course of trade in long-established commercial communities, and should be applied with great caution to avoid fettering the commerce of our growing towns by hasty judicial recognition of their early crude and temporary customs. See Harper *v.* Pound, 10 Ind. R. 32; Wall *v.* East River Insurance Co., 3 Duer 273; and the remarks of Judge STORY in the case of The Schooner Reeside, 2 Sumner 567. J. T. M.

Superior Court of New York.

JOHN R. LEWIS *vs.* MELANCTHON BURR, assignee of JAMES SHARP.

Where a person, having at the time a lease for an unexpired term, assigns all his property, in trust for the benefit of his creditors, and the assignment does not disclose, and the assignee is ignorant at the time he accepts of the assignment, that the assignor owns such a lease, the assignee will not become liable for subsequently accruing rent, if he does not enter into the possession of the demised premises, as such assignee, or do any act which can be regarded as an election to accept of the term.

Where the assignment is made on the 28th of January, and the assignee merely enters, to take an inventory of and remove assigned property being on the demised premises, and completes the inventory and removes the property on the 31st, staying no longer than is necessary for that purpose; and never further or otherwise occupies the demised premises, he does not, thereby, become liable for the rent falling due February 1st, or subsequently.

Whether a voluntary assignee of property, in trust for the benefit of creditors, stands in the same position as an assignee in bankruptcy, in respect to a lease owned by the assignor at the time of the assignment, discussed by BOSWORTH, Ch. J.

This action was submitted to the Court at general term, in November 1860, for its judgment, upon a case containing the facts upon which the controversy depends, agreed upon by the parties pursuant to section 372 [325], of the New York Code. The plaintiff, as assignee of one Ossian L. Hatch, claims to recover a quarter's rent of premises demised by Hatch to one James Sharp. Sharp, on the 28th of January, 1860, being insolvent, assigned all his property to the defendant, in trust for the benefit of the creditors of Sharp: the rent in question fell due Febuary 1st, 1860. The question is, whether the defendant, on the facts of the case (and which are stated in the opinion of BOSWORTH, Ch. J.), is liable for such rent.

Martin & Smiths, for plaintiff.

H. M. Whitehead, for defendant.

By the Court, BOSWORTH, Ch. J.

James Sharp, on the 28th of January, 1860, was the lessee of

one Ossian L. Hatch, and as such lessee, held a lease of a part of the store and basement of No. 26 Church street, in the city of New York, at an annual rent of $1500, payable quarterly, which lease, by its terms, was for four years and nine months from May 1st, 1859.

On the 28th of January, 1860, Sharp, by a written assignment, *assigned all his property, real and personal*, to the defendant, in trust for the benefit of the creditors of Sharp. The assignment did not specify the lease as part of the property assigned.

The assignment was executed by the defendant, and it recites that he "shall, and does, hereby and hereunder, take possession of all and singular" the property thereby assigned. When the assignment was executed, there was a stock of goods on the demised premises belonging to the assignor.

It is agreed by the parties, as facts in the case, that on said 28th of January, "the defendant as such assignee, entered the demised premises, took possession of the stock embraced in said assignment, took an inventory thereof; and the assignor Sharp, with the approval of the defendant, exhibited the entire stock for sale, on the demised premises, to two persons. The inventory was completed on the 30th. The defendant on that day, at the auction room of several auctioneers, negotiated for the removal and sale by auction of said stock of goods, and on the 31st of January, he removed all of said stock of goods from said premises, and the defendant has not since that time, nor otherwise than as above stated, actually occupied the same."

"That the time taken to make said inventory, was reasonable and necessary.

"The rent reserved in said lease, is greater than the value of the use and occupation of the demised premises.

"The defendant has not in any manner assigned or disposed of his right, title, and interest (if any he ever acquired) in the lease."

Is the defendant, upon these facts, liable for the quarter's rent, $375, falling due February 1st, 1860? That rent has not been paid, and the plaintiff, as assignee of the lessor's claim for it, seeks to recover it from the defendant.

We regard it as settled, that an assignee in bankruptcy does not, by the mere force of the assignment and his acceptance of it, become the assignee of an *unexpired term* of a lease, which the bankrupt may own when the assignment is made, in such sense, that he cannot decline to accept the term, and avoid incurring liability, as assignee, for subsequently accruing rent. The assignee may decline to accept of the term, and in that case will not be liable as an assignee of the lease. But if he enter into the possession of the demised premises, and occupy them as such assignee, he will be liable for rent accruing during such occupation. He will not become liable by merely entering into the demised premises, for the purpose of taking possession of other property of the bankrupt and removing it. *Martin* vs. *Black*, 9 Paige 644. *How* vs. *Kennett*, 3 Ad. & Ellis 659. *Hanson* vs. *Stevenson*, 1 Barn. & Ad. 304. *Copeland* vs. *Stephens*, Id. 594.

If a voluntary assignee of property, in trust for the benefit of the creditors of the assignor, stands in the same position; then the only question will be, whether the defendant has done any acts, signifying his assent or election to accept of the term.

There is no doubt, that, if he accepts of the term as assignee, he will be liable for rent accruing whilst he holds the estate as assignee. *Patten* vs. *Deshon*, 1 Gray 329.

So a mere equitable assignee of a lease, who, as such, has entered into possession and occupied the demised premises, is liable for the rent accruing during such occupancy. *Jenkins* vs. *Portman*, 1 Keen 435. S. C., 15 Eng. Ch. R. 455, note 2. *Close* vs. *Wilberforce*, 1 Beavan 113.

But may a voluntary assignee accept of the general assignment made by the assignor, and reject the term? In the present case, it does not appear that the assignee when he accepted of the assignment, knew that his assignor owned the lease; and the question is to be considered, in view of this, as one of the facts in the case.

In *Carter* vs. *Warne*, 4 Carr. & P. 191, Lord TENTERDEN, C. J., held and charged the jury, that a voluntary assignee of property, in trust for the benefit of creditors, stood in the same position as an assignee in bankruptcy. This ruling is adverted to by

LITTLEDALE and PATTESON, Js., in their opinions in *How* vs. *Kennett*, *suprà*. But it can hardly be said, that either of them expressed the opinion that it was accurate.

In *Pratt* vs. *Levan & Snyder*, 1 Miles 358, it was held, that the voluntary assignee might reject the term, and that the same rules applied to him as to an assignee in bankruptcy. In that case, however, the lease was not assignable except by the written consent of the lessor, and that consent he never gave. See *Morris* vs. *Parker et al.*, 1 Ashmead 187. The case of *Carter* vs. *Hammett*, 12 Barb. S. C. R. 253, favors the same view. The N. Y. Common Pleas in *Journeay* vs. *Brackley*, 1 Hilton 447, determine the precise point, in favor of the voluntary assignee. No case has been cited, which decides to the contrary.

The cases in this Court, in which the voluntary assignee has been held liable, are not in conflict with the rule for which the defendant contends.

In *Young* vs. *Peyser*, 3 Bos. 308, the assignee entered into the demised premises, and took possession thereof, by virtue of the assignment, and occupied the premises until he surrendered them and the lease to the plaintiff, who accepted them. The assignee was held liable for the rent which fell due, during such occupation.

The same rule was applied in *Astor* vs. *Lent*, 6 Bosw. 612.

The case of *Muir* vs. *Glinsman* (argued at the January and decided at the February General Term of this Court 1856), and commented on in *Journeay* vs. *Brackley*, *suprà*, 1 Hilton 455–457, is not in conflict with the decisions in the latter case, or with that made in *Pratt* vs. *Levan*, *suprà*.

Muir vs. *Glinsman* did not seek to charge the assignee personally, and the judgment, pronounced at special term, directed that the quarter's rent which fell due November 1st, 1854, should be paid by the assignee out of the proceeds of the assigned property in his hands; the complaint alleging, and the answer not denying, that Glinsman had in his hands proceeds of the assigned property sufficient to pay such rent. Muir, on the 29th of April, 1854, leased to one James Grundy the second and third floors of the premises, No. 442 Broadway, for two years, from the 1st of May then next, at $1950 per annum, payable quarterly. In Septem-

ber 1854, Grundy, being in the occupation of the demised premises, and having become insolvent, assigned all his property (in trust for the benefit of creditors) to *Glinsman*. The latter immediately took actual possession of the premises, and of the assigned property therein; put a clerk in possession, who continued therein, making sales therein, until after the 1st of November, 1854, when the quarter's rent, which that action was brought to recover, became due. The assigned property (including the lease) was mortgaged by a chattel mortgage made prior to the assignment, and in force when it was made. In the language of that case, "there was considerable of the assigned property left, after satisfying the mortgage," and "part of the goods were sent from the store in Broadway to a store in Nassau street, and were returned after the mortgage was satisfied." The goods so returned, were sold on the demised premises.

The evidence justified the conclusions that the assignee entered the demised premises with intent to occupy them, and to occupy them as assignee, by virtue of the assignment, and did so occupy them; and the Court thought the assignee had no ground of complaint in the fact that he was ordered to pay that quarter's rent out of the moneys in his hands, realized from the assigned estate, instead of paying it out of his own funds. See *Astor* vs. *L'Amoreux*, 4 Sand. S. C. 524; s. c., 4 Seld. 107; *Childs* vs. *Clark*, 3 Barb. Ch. R. 52; *Calvert* vs. *Bradley*, 18 How. U. S. R. 580. If we are at liberty to follow the decisions made in *Pratt* vs. *Levan*, and *Journeay* vs. *Brackley*, *supra*, there is nothing in the plaintiff's equities which should disincline us to do so. See opinion of DENMAN, C. J., in *How* vs. *Kennett*, *supra*.

Voluntary assignees of property in trust for the benefit of creditors, administer large estates; and their appointment is a matter of almost daily occurrence: they are, by existing laws, placed on the same footing, in respect to the costs of suits brought by and against them, as executors and administrators. Code, § 317.

They may maintain actions for the benefit of creditors, to reach property which their assignor had disposed of, with intent to defraud. Laws of 1858, p. 506, ch. 314.

The same considerations of public policy which permit an assignee in bankruptcy, a receiver, or executor, to reject a term which would be a charge instead of a benefit to the estate he is appointed to administer, would seem to favour its application to a voluntary assignee for the benefit of creditors.

The recent legislation in this State, already referred to, seems to have its origin in the same views.

We think, therefore, that the defendant's liability in this case depends upon the question, whether he entered under such circumstances as manifest his assent to accept the term.

The case concedes that the rent reserved is more than the value of the use of the demised premises. It was, therefore, the duty of the assignee to waive the term, if he had the right to do so.

He was not in possession when the rent in question accrued: he has not paid any rent to the plaintiff. The assignment does not import that the assignor had any such property as the lease in question, nor does it appear that the assignor knew that he had. Had it appeared that the assignee knew, when he accepted of the assignment, that the assignee owned this unexpired term, what effect should be given to that fact, it is unnecessary now to consider.

The case does not state that the assignee took possession of the demised premises.

It states that he entered them, and "took possession of the stock," &c. And as it also states that he did not occupy the premises, otherwise than to make an inventory of the goods and remove them, and stayed no longer than was necessary for that purpose—all having been concluded on the third day after the assignment was executed—we are of the opinion, upon the facts as the parties have stated them, that his entry was solely for the purpose of possessing himself of the stock, and without any intent to accept of the term.

That he did nothing which could have led the plaintiff to suppose that he entered upon the premises with a view to take possession of them as assignee, even if the plaintiff knew, before the goods had been removed, that any assignment had been made.

These views entitle the defendant to judgment.

Supreme Court of Pennsylvania. February 2d, 1863.

PHŒNIXVILLE *vs.* THE PHŒNIX IRON COMPANY.

Where the public acquire a right of way over a race previously dug by the owner of the land, the burden of building and maintaining such a bridge as is necessary for the highway, rests upon the public.

On the other hand, where the owner of the land, for his own purposes, digs a race across an existing highway, he is bound to build and keep in repair such bridge as is necessary for the highway.

His obligation is proportioned to the public right at the time. If the way be only a footway, a bridge to accommodate foot-passengers is all he is required to build or maintain. If the public subsequently acquire greater rights, his obligation is not increased.

Therefore, in a case where a bridge built by defendants' vendor had been carried away and a new one built wider and higher, to correspond with a new road laid out by order of Court on the site of the old one, it was *held*, that defendants were not liable for repairs to this new bridge.

STRONG, J., delivered the opinion of the Court.

If the public acquire a right of way over a race previously dug by the owner of the land through which it passes, the burden of building and maintaining such a bridge as is necessary for the highway, rests upon the public. On the other hand, it is equally clear, that, if the owner of a mill make a channel to it across a highway already in existence, and build a bridge over the channel which is used as a public bridge, he shall be bound to repair. This is laid down in 1 Rolle's Ab. 368, title *Bridges*, pl. 2, and it has been ever since recognised as law. *Perley* vs. *Chandler*, 6 Mass. 454. *Dygert* vs. *Schenk*, 23 Wendell 446. *Woodring* vs. *Forks Township*, 4 Casey 355. The reason given is, that the bridge is erected for the private benefit of the owner of the mill. To this might be added, that it is made necessary by his interference with the way in which the public had acquired a right. Though he may dig and maintain a race through a highway, the fee simple of which belongs to him, he cannot do it at the expense of the rights of the public. He must preserve the highway, without any diminution of the right to its enjoyment which the public had obtained before; and hence, his obligation to build and maintain a bridge, such as shall keep the way in substance as good as

it was before he dug his race. His obligation is proportioned to the public right. If the way be only a footway, a bridge to accommodate foot-passengers is all that he is required to build or maintain. If the public subsequently acquire greater rights his obligation is not increased, for with those enlarged rights he has not interfered.

We understand the Court below to have instructed the jury in accordance with these principles. When the race was dug, the public had acquired rights to a way which had been opened, and upon which repairs had been made by the supervisors of the township. Then it became the duty of the landowner, on excavating the race across the way, to build a bridge over the race adequate for the road, as it was then open. Beyond the road, as open, the public had no right of way. Such a bridge was constructed, so far as appeared, satisfactorily to the public authorities. Some years afterwards, by order of the Court of Quarter Sessions, a new road was laid out and opened partially on the site of the old road, crossing the race, but of the width of thirty-three feet, while the width of the old road at the crossing was but twenty feet. For a time travelling on the new road was over the bridge as it had been, but the bridge having been carried away, a new one was erected, wider and higher than the former, to accommodate the road as it had been located by order of the Court. The question raised on the trial was, whether the defendants, who succeeded the owners at the time the race was dug, are liable for repairs to this second bridge. Upon this subject the charge to the jury must be considered as a whole. We may not extract a single sentence and overlook its connection and qualification. The substance of the instruction given to the jury was, that there was nothing in the single fact that a new road had been laid out, that relieved the defendants from their obligation to maintain the bridge; that if the new road was substantially the same as the road which was there when the race was cut, they were bound to keep the bridge in repair. On the other hand, they were instructed, that if the new road differed materially from the old one at the race crossing; if it was not on the same ground, or was widened, and, in conse-

quence of the change, a different bridge was required to accommodate the new and different right of the public, the defendants were not bound to construct such a bridge or keep it in repair. The part of the charge singled out for exception, is but a substantial repetition of the instruction. It is not a just view of it, which sees any such doctrine as the plaintiff in error urges is found in it. The jury could not have understood it to mean, that, if the new bridge would accommodate more passengers than the old one, the defendants were not liable. The language of the Court referred to different rights of the public, not to a difference in the number of travellers along the highway. With such new rights, if any there were, the defendants had never interfered, and therefore, repairs of a bridge erected in pursuance of these rights could not be demanded of them. This part of the charge was at least as favorable to the plaintiffs as they had a right to demand.

The second assignment of error is, that the Court erred in charging the jury, that the plaintiffs could not recover for money expended in repairing the footway alongside of the county bridge, over French creek. The assignment, we think, is well founded. The footway was erected by the vendor of the defendants, not as the price paid for a franchise given, but as a substitute for a portion of the public right appropriated to themselves. By the Act of Assembly, they were allowed to occupy the bridge over French creek with railroad for their private use; but they were required by the same Act, to construct a convenient and substantial footway over the creek, to be attached to the bridge on the west side, as soon as their railroad should be laid on the bridge. The railroad was constructed over the bridge as authorized by the Act, and as required, the footway was built. With this the court was of opinion the obligation of the defendants was satisfied. It is true, the language of the Act is, that the footway shall be constructed as soon as the railway is laid over the bridge. It does not in words say anything of repairs, but the Act is to be construed according to its intention. That intention, it is true, is to be gathered from its words, but not from any single word. We must ascertain its spirit and meaning from all the language employed. Now the

requirement of a footway contemporaneously with the occupation of the bridge by a railway, makes it clear, that the Legislature did not intend to diminish the rights of the public or the convenience of the foot-passengers. It was evident that the use of a railway over the bridge would obstruct and endanger passage on foot. It was most just, that while the grantees of the privilege continued to use the bridge for such a way and for their private advantage, they should provide other means of passage equally convenient and lasting, with those which the public would have enjoyed had it not been for their interference. It is a fair presumption, that the Legislature never intended to give away public rights or to impose a burden upon any local community without compensation. Yet, if the construction of the Act contended for by the defendants is correct, a burden has been imposed on the plaintiffs—namely, the maintenance of the foot-bridge, solely for the private advantage of those who are using the railway. For their benefit the footway was erected, and for their benefit it is maintained. There is, then, the same reason for requiring them to repair, that there was for requiring them to erect. We think, therefore, the Act of Assembly imposed a continuing obligation to provide the designated substitute, for the diminished facility and safety of passage across the bridge, so long as the public right shall thus be abridged. And such has been the construction given to similar language in other legislative Acts. Thus, in *Rex* vs. *The Inhabitants of the County of Kent*, 13 East 220, it was ruled, that a company, which by Act of Parliament had been empowered to make a river navigable and to take tolls, "and to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others as convenient in their room," was bound to repair a bridge which, under the Act, they had built forty years previously to the indictment. Lord ELLENBOROUGH declared it to be a continuing condition, and all the judges held, that the word "*leaving*" imported both building and continued maintenance, because the alteration in the old highway was made for the purposes of the company. The doctrine of *Rex* vs. *The Inhabitants of Lindsay*, 14 East 317, seems to be, that when the acts of a grantee of a